

No. 3375

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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EDWARD WHITE, as Commissioner of
Immigration, for the Port of San
Francisco,

Appellant,

VS.

FONG GIN GEE,

Appellee.

BRIEF FOR APPELLEE.

JOSEPH P. FALLON,

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The opening statement of the case by the appellant is correct with the exception that it is not made clear what the final decision of the Secretary of Labor was in the matter. It is true that the Commissioner of Immigration for the Port of San Francisco denied the appellee admission to the United States on the grounds "that the mercantile status and relationship is not established to my satisfaction". An appeal was taken from that decision and the Secretary of Labor denied the application on the single ground "that the alleged father has not satisfactorily established that he is a merchant within the meaning of the law".

The discrepancies appearing in the testimony and upon which the Commissioner of Immigration at the Port of San Francisco concluded that the relationship of father and son had not been established to his satisfaction were so trivial in the judgment of the Secretary of Labor that he could not, in good conscience, find that the relationship did not exist, and it was conceded by the appellant that the appellee was in truth and fact the son of Fong Chung. The Secretary, however, held that the said Fong Chung had not established the fact that he was a merchant within the meaning of the law.

The appellant on pages four to eight, of its brief, devotes considerable argument to the finality of the decision of the executive officers, contending that the Secretary of Labor is the final judge of the facts, and the Court is without jurisdiction to intervene. We admit that the Secretary of Labor is the sole judge of the facts and his decision is final, provided his findings of fact are based upon substantial evidence and not upon mere suspicion and conjecture, but in applying the law to those facts his judgment is not final, and that he cannot arbitrarily, mistakenly and erroneously make a wrong application of the law.

Whitfield v. Hanges, 222 Fed. 745;

McDonald v. Sier Tak Sam, 225 Fed. 710;

Ex parte Sam Pui, 217 Fed. 456;

Ex parte Chan Kam, 232 Fed. 855; ⁸⁴⁹

Ex parte Owe Sam Goon, ²³⁵ ~~230~~ Fed. ~~654~~.

In the instant case it was admitted that the appellee is the lawful son of Fong Chung; that the said Fong Chung has an interest in the Man Hop Company of Woodland, California; that the said company has a fixed place of business; that said company, as a department of its business, deals in poultry; that orders are taken from customers and that the same are delivered to said customers, and the sole question involved is whether the work done by the said Fong Chung is work consistent with the duties of a merchant, and the Secretary having clearly found what the duties of the said Fong Chung were in connection with the business of the Man Hop Company, it is one of law and not of fact as to whether those duties are inconsistent with his status as a merchant, and the decision of the Secretary of Labor on a matter of law is not final.

The District Court had the entire record of the case before it and Judge Dooling stated in reference to the facts, the following:

“As I read the record in this case, the Bureau does not find that the father of the detained has no interest in the Woodland store, but bases its finding that he is not a merchant on the fact that he buys and collects chickens from farmers throughout the country and sells and delivers them to customers in Sacramento. But it seems to me that if the firm of which the father is a member, is one really dealing in poultry and eggs, receiving orders for such and sending the father out to procure and deliver them, this does not make him a pedlar within the meaning of the law, even though on his trips he does occasionally solicit eggs and

poultry from farmers in the first instance, or look for an occasional customer at Sacramento for his surplus supply.”

The question here involved is whether the work performed by the said Fong Chung brings him within the purview of the statute as a merchant.

The Act of November 3, 1893, 2 Supp. Rev. St. U. S. page 154, provides as follows:

“The term merchant as employed herein and in the acts of which this is amendatory shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.”

The Circuit Court of Appeals for the Ninth Circuit, in the case of *Ow Yang Dean v. U. S.*, 145 Fed. 801, in speaking on this point said:

“We are led to inquire, therefore, what is the meaning of the statute, and what labor may be said to be necessary in the conduct of the appellant’s business? In the ordinary business of a merchant no manual labor whatever is necessary. The statute contemplates that a Chinese merchant may do manual labor. The restriction is that it shall be such labor as is necessary in the conduct of his business as a merchant. The statute should receive a reasonable construction. If the appellant was permitted to engage in manual labor in connection with his business, we see no reason for holding that the work which he did, as fairly estab-

lished by the evidence, was not such work as was necessary.”

Ow Yang Dean v. U. S. 145 Fed. 801;

U. S. v. Sun, 76 Fed. 450;

Lee Kan v. U. S., 62 Fed. Rep. 914.

In the instant case the facts are substantially as follows, and not disputed by the appellant, to wit: Fong Chung is a member of the Man Hop Company; that the Man Hop Company conducts a business at a fixed place; that they deal in poultry and that Fong Chung attends to the poultry business for the firm. These facts being conceded, the only question involved is whether the work done by the said Fong Chung is work incident to and necessary to the carrying on of said business. The District Court had the entire record before it, examined the evidence carefully, and came to the conclusion that it was necessary to the proper conduct of the business of the Man Hop Company, and clearly established the status of the said Fong Chung as a merchant as defined by the law.

We respectfully urge that the judgment of the District Court be sustained.

Dated, San Francisco,

October 22, 1919.

JOSEPH P. FALLON,

Attorney for Appellee.

